which he was so induced to sign, and the claim against him must fail.

The 2nd defendant does not dispute liability for breach of the contract he has signed, and it simply remains to assess what reparation is due by him to plaintiff.

He admits failure to pay all save one instalment of the monthly hire and is therefore liable on that account for balance of rent up to expiry of contract amounting to $5,366. The motor boat is now and has been since March 1947 out of the jurisdiction of the Court of the Federation in Siam and is in pledge there and must therefore be considered a total loss, and plaintiff is entitled to its full agreed value of $10,000. The 2nd defendant admits that he had the use of this boat in Siam and lived in it till some time in March, 1947, and plaintiff is therefore entitled to hire for that period, i.e. 3 months of 1947, at $1,000 p.m., i.e. $3.000/-.

Judgment will be entered for defendant No. 1 with his costs to be taxed by the Registrar as far as the claim against him goes.

As to the claim against the 2nd defendant, there will the judgment for the plaintiff for $18,366 and costs as incurred in regard to the plaintiff's case against him.

Claim against 1st defendant dismissed. Judgment for plaintiff against 2nd defendant.

MOHAMED SAAD BIN MOHAMED NOR v. HASNAH BINTE ADAM.

[Rev. Civ. Juris. (Callow, J.) January 6, 1949]

[Malacca — Originating Motion No. 8 of 1948]

Mohammedan Ordinance ss. 20, 22 and 29 — Mohammedan Law — Jurisdiction of Magistrate — Application for Maintenance — Order of nusus — Minor Offences Ordinance 37 — Civil or Criminal Proceedings — Revision — Courts Ordinance (Cap. 10) s. 19.

In this case the parties had appeared before the Kathi of Malacca who inquired into the matter and eventually declared the wife (respondent) nusus under section 20 of the Mohammedan Ordinance. Subsequently the wife (respondent) applied for maintenance to the Magistrate's Court. The learned Magistrate held that as the Kathi had made no order as to maintenance therefore he (the Magistrate) had jurisdiction to hear the wife's claim in accordance with section 37 of the Minor Offences Ordinance. The learned Magistrate ordered the husband to pay maintenance. The husband applied to the High Court to have the proceedings set aside on the ground that the decision was wrong in law.

Held, (1) that the institution of the claim for maintenance in the Magistrate's Court after the Kathi had expressly found the respondent nusus and therefore disentitled to any maintenance was an abuse of process; (2) that therefore the order for maintenance must be set aside.

Cases referred to:—

(1) *Chew Cheng Swee v. Chan Chye Neo* (1932) M.L.J. 5.

(2) *Kok Hung Chow v. Lay Mee Yin* (1948) M.L.J. 157.

ORIGINATING MOTION.

S. Shanmugan for the applicant.

Respondent in person.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Callow, J. : — This is an application for an Order in exercise of the powers contained in section 19 of the Courts Ordinance (Cap. 10) that the proceedings in the Court of the Magistrate, Malacca, between Hasnah binte Adam (hereinafter called the respondent) and Mohamed Saad bin Mohamed Nor (hereinafter called the applicant) be set aside on the grounds that the decision is wrong in law.

I should state in the first place that I was exercised whether in view of section 19 of the Courts Ordinance (Cap. 10) this Court could consider the application in view of the amount involved, the total being far in excess of the one hundred dollars. It is clear by the case of *Chew Cheng Swee v. Chan Chye Neo*[1] that the proceedings are civil and not criminal, despite being taken under the Minor Offences Ordinance; and by *Kok Hung Chow v. Lay Mee Yin*[2] which though a Federation case I follow, proceedings in revision may be held.

The facts are that the parties married according to Mohammedan law on the 1st of April, 1945, but after a few months they separated, the respondent returning to her parent's house and refusing to live again with her husband the applicant.

On the 18th of November, 1945, and the 14th of September, 1947, the parties were before the Kathi of Malacca who by virtue of his powers contained in Part II of the Mohammedan Ordinance (Cap. 57) inquired into their matrimonial discord, and eventually declared the wife (respondent) *nusus* (section 20 of the Mohammedan Ordinance). This word is a Malay variation of *nashizah* (*Baillie* page 438: *Wilson*, 5th edition page 124) or *neshuz*, (the *Minhaj*, index and page 318) all meaning recalcitrancy.

By such declaration the wife (respondent) has no claim for maintenance until she returns to her husband's house (*Baillie,* page 438). This was accepted by the Magistrate in his grounds of decision, and is undoubtedly correct Mohammedan Law. Her right to to "maintenance will lapse when" she refuses intercourse or dalliance; or where she goes out "without leave and he cannot prevent her from going"; this citation is from *Mukhtasar* of *Sidi Khalil,* a work more freely used in the Maliki School of law, but the principles are equally applicable in this, the Shafei School. The last sentence of the citation is of note; where the husband is present and could prevent the wife's departure, but does not do so, she is deemed to have gone with his permission. In *Syed Ameer Ali's* work (I have tried to limit my authorities as far as possible to those text books set out in section 29 of the Mohammedan Ordinance, although those books are only obligatory when deciding questions of succession and inheritance) it states :—

"When the woman abandons the conjugal domicile without any valid reason, she is not entitled to maintenance. Simple refractoriness, as has been popularly supposed, does not lead to a forfeiture of her right. If she were to refuse cohabitation or to obey the husband's wishes whilst living with him, she would not lose her right to her proper maintenance. But if she were to leave the house against his will without any valid reason, she would lose her right, but would recover it on her return to the conjugal domicile.

What is a valid and sufficient reason for the abandonment of the conjugal domicile is a matter for the discretion of the Kazi or Judge. As a general principle and one which has been adopted and enforced by the Kazis' mahkamas in Algeria, a wife who leaves her husband's house on account of his or his relations' continued ill-treatment of her, does not come within the category of nashizah and continues entitled to her maintenance."

Before me the respondent stated she had pleaded cruelty before the Kathi, but there is no mention of this in the Kathi's record (Ex. P–1), and I think it must be assumed that if indeed it was raised it received due consideration before the finding of *nusus* was reached.

Clearly it was put forcibly before the Magistrate who not only gave it close and detailed care, but found strongly in the respondent's favour. He said in his grounds of decision :—

"The serious allegation about a very delicate matter was made in Court in the presence of the husband, and never once did he deny it even though the Court had been cleared. I believe this allegation also for the following reasons: It is not usual for young Malay girls to come out in the open with such accusations as this unless she has good reason for so doing. The demeanour in Court of the husband, the way he cross-examined his wife and the way he addressed the Court easily convince me that in his dealings with his wife Hasnah he could not have shown that consideration and kindness which are usual — or at least to be expected — from a husband to a wife."

The Magistrate took the view that because the Kathi made no order as to maintenance therefore he (the Magistrate) had jurisdiction to hear the wife's claim in accordance with section 37 of the Minor Offences Ordinance (Cap. 24). But the effect of the Kathi's declaration of *nusus* is to deprive the wife of any right to maintenance. Incidentally the respondent is not destitute, she said so in this Court, and further that she intends to seek *Khula* divorce (*Wilson,* 5th edition page 143); this I will refer to later. She also admitted that dowry had been paid in full.

Thus the present situation is that in the Court of the Kathi the respondent is declared not entitled to any maintenance, while in the Court of the Magistrate she is entitled to monthly payments of $15/- and arrears. Furthermore, the Magistrate found cruelty, while if that was pleaded before the Kathi, he found insufficient for the abandonment of conjugal life.

In my view it would be wrong to bar claimants to maintenance access to the Magistrate's Court, but I do not consider the Court of the Magistrate should be used by a party who has already been before the Kathi's Court and after that Court has recorded a finding. The Court of the Magistrate should not be used by way of appeal by a party aggrieved by a decision of the Kathi.

Suppose the Magistrate declined to make an order for maintenance. Can the wife then go to the Kathi who might grant maintenance by virtue of his powers contained in section 22(1) of the Mohammedan Ordinance? Then demand for the execution of the Kathi's order could be made to the Magistrate (section 22(5) of the Mohammedan Ordinance), who would thus be required to grant and issue execution of an order previously by him refused.

It seems to me that litigants must confine themselves *either* to the Magistrate's Court, with subsequent appeal or petition for revision, *or* to the Kathi's Court with similar following rights of further procedure. A person once having appeared and by appearance without protest be deemed to have accepted the jurisdiction of either the Magistrate or the Kathi, must, if dissatisfied, advance along the avenue of subsequent procedure appropriate for the particular Court; he or she cannot if aggrieved by the decision of one, switch to the channel of the other to seek remedy. I have not dealt with the instance of a party who appears in the one Court and protests as a preliminary that he prefers the other; the point can be determined should the occasion arise.

It may certainly be argued that the existence of section 22 (6) of the Mohammedan Ordinance barring maintenance proceedings under section 37 of the Minor Offences Ordinance, suggests only limitation where an order for payment has been made, and so where no such order has been made right of action in the Magistrate's Court may lie. But a declaration of *nusus* is more than a negative, it is a finding of recalcitrancy involving a rule of Mohammedan law that the wife is not entitled to any maintenance. I think it would be entirely contrary to the tenor of the Mohammedan Ordinance to allow proceedings in the Magistrate's Court where *no* maintenance is held by the Kathi, and bar such proceedings where liability for maintenance *is* held.

The respondent said frankly in this Court that she declined to return to her husband. Under such circumstances divorce would appear to be the only step. The husband (applicant) refuses to divorce the respondent, and the only avenue available to her is to seek a *Khula* divorce; the respondent should offer and the applicant may accept compensation for the release of marital rights (*Wilson*, 5th edition page 143).

But when the respondent stated that she sought the Magistrate's Court because she was vexed at the applicant obtaining the Kathi's declaration that she was *nusus*, then I consider an abuse of the process of the Magistrate's Court occurred. The dissatisfied respondent could have appealed against the Kathi's decision (section 22(4) of the Mohammedan Ordinance) and still has liberty to petition under section 25 of the same Ordinance.

I am bound to hold that the institution of the claim for maintenance in the Magistrate's Court after the Kathi had expressly found the respondent disentitled to any maintenance was an abuse of process. I therefore allow the motion. The proceedings in the Court below being before me are hereby revised, and in exercise of my powers contained in section 19 of the Courts Ordinance I set aside the order for maintenance.

The result is that the declaration of *nusus* by the Kathi stands alone.

Costs of the proceedings in this Court and in the Court below to be borne by the respondent.

Application allowed.

ESTATE OF LOH AH TONG.
LOH SIEW LAN (f) v. TAN AH ENG (f).

[Orig. Civ. Juris. (Laville, J.) April 28, 1949]

[J.B. — Probate No. 9 of 1941]

Will — Presumption of due execution — Proof of forgery.

In this case the issue before the Court was the genuineness of the signature "Loh Ah Tong" on a Will, sought to be proved before the Court. The will was attested by Mr. Osborne-Jones an Advocate and Solicitor of Singapore and his clerk, but in evidence it appeared that Mr. Osborne-Jones had no personal knowledge of the person who had made the signature on the Will. The clerk who had attested the signature had died. Mr. Y. H. Tsan gave evidence, as an expert on Chinese character writing, that the signature was not made by the deceased.

Held, that the defendant had discharged the onus thrown on her and had proved that the propounded will was a forgery.

Case referred to :—

(1) *In the goods of Mylne* (1905) 9 C.W.N. 986.

PROBATE SUIT.

M. Ismail for the plaintiff.

G. H. Toh for the defendant.

Laville, J. : —In this suit Loh Siew Lan (f) asks the Court to declare in favour of a will appointing her executrix alleged to have been made by her father, Loh Ah Tong alias Loh Soon Chuan, on 10th July, 1937, at Singapore.

The grant of probate of this will is opposed by Tan Ah Eng (f), the second wife of the alleged testator, on the ground that the signature Loh Ah Tong to the will was not inscribed or authorised by Loh Ah Tong, her deceased husband and the father of the plaintiff, but by some other person.

The sole issue therefore is the genuineness of the signature Loh Ah Tong on the said will.

The plaintiff's case is that she is his eldest child born in wedlock, was of full age at the date of the will, and that because his two wives were ignorant, uneducated women and his only natural born son an infant, and his other sons merely so by adoption, it was natural for him to appoint her as executrix of his estate and to leave her the largest portion of it; that the will, Ex. A., is properly executed and attested by two witnesses, one of whom, Mr. D. C. Osborne-Jones, an Advocate and Solicitor of Singapore, and by his clerk, Mr. Goh Lai Mui, and there are no grounds for doubting the authenticity of the signature of Loh Ah Tong on the will, and, if that is so, she is entitled to probate; thirdly that the defendant has produced and